PUBLIC PROSECUTOR

v

MISWADI RADOL & ORS

HIGH COURT MALAYA, JOHOR BAHRU
DATO' ABDUL MALIK ISHAK J
[CRIMINAL APPLICATION NO: 44-15-1996]
18 JUNE 1996

CRIMINAL PROCEDURE: *Charge – Framing of charges – Whether adherence to language of statute germane – Whether paraphrasing useful*

CRIMINAL PROCEDURE: *Transfer of cases – Jurisdiction of High Court – Transfer of case from one Court to another – Whether permissible – Whether direction of Chief Judge of Malaya required – Courts of Judicature Act 1964, s 20*

CRIMINAL PROCEDURE: *Trial – Joinder of offenders – Common law principles applicable – Criminal Procedure Code, s 170 – Discretion of Court – Whether prosecution has a say – Whether 'different offences in the same transaction'*

This was an application by the prosecution for a joinder of offenders under s 170 of the Criminal Procedure Code ('the CPC') in order that the respondents may be jointly tried herein in the High Court at Johor Bahru (Court No: 2) ('Court 2').

The second and the third respondents were jointly charged in the Johor Bahru Sessions Court under 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') for jointly trafficking in a dangerous drug. In due course, the case was transmitted to Court 2 pursuant to ss 39B(3) and 41A(1) of the DDA.

At the same time, the case involving the first respondent, who was charged in the Johor Bahru Sessions Court under s 39B(1)(c) of the DDA for doing an act preparatory to trafficking in a dangerous drug, was transmitted to the High Court at Johor Bahru (Court No: 3) ('Court 3').

The hearing date of the case against the second and third respondents was then fixed by Court 2. However, the case against the first respondent was not yet fixed for hearing by Court 3. The prosecution then filed an application to join the first respondent (whose case was already slotted before Court 3) with the second and third respondents (whose case was already slotted before Court 2).

Held:

[1] The delay by Court 3 in fixing the hearing date of the case against the first respondent was no concern of Court 2. However, the prosecution's instant application for a joinder of offenders (which, by necessary implication, meant that the case against the first respondent before Court 3 had to be transferred to Court 2) was of paramount importance as it ran counter to s 20 of the Courts of Judicature Act 1964 ('the CJA'). Without the direction of the Chief Judge of Malaya, Court 2 was in no position to simply wrest the said case from Court 3.

[2] The prosecution was blameless in regard to the differences between the charges that were filed in the Johor Bahru Sessions Court and those appearing in the Consent and Requisition of the Public Prosecutor. The prosecution is perfectly free to tender amended charges before Court 2 and Court 3 in order to blend them with the Consent and Requisition of the Public Prosecutor.

[3] In drawing up charges, it is a wholesome rule that the prosecution adheres to the language of the statute as far as practicable; nothing is gained by a paraphrase – while opportunity is afforded to the accused to take exception to the form of the charge.

[4] It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated; they are proximity of time, unity or proximity of place, continuity of action, and continuity of purpose or design. Nevertheless, the ingredients of the 'same transaction' as expounded above must be read and applied cumulatively and not exclusively. Considered in this context, there were no good reasons to order a joinder of offenders under s 170 of the CPC in respect of the instant application.

[5] Section 170 of the CPC enacts that where several persons are accused of committing the same offence or several offences of the same kind or different offences in the same transaction, then all the accused persons may be charged and tried together or separately as the court 'thinks fit.' Thus, the power to order separate or joint trials is exercisable entirely at the discretion of the court; the prosecution has no say in it.

[Application refused.]

Cases referred to:

Chong Siew Choong v Public Prosecutor [1996] CLJ JT (14); [1996] 2 CLJ 823 ***(foll)***

Lim Beh v Opium Farmer [1842] 3 Ky 110 ***(refd)***

Mahomed Humayoon Shah v Regina 21 WR Cr 72 ***(refd)***

Amrita Lal Hazra v Emperor 42 Cal 957 ***(foll)***
Lim Yean Leong v Public Prosecutor [1940] 9 MLJ (FMSR) 272 ***(cit)***
Babulal Choukhani v Emperor AIR 1938 PC 130 ***(cit)***
Jayaraman & Ors v Public Prosecutor [1979] 1 MLJ 88 ***(cit)***
Saif Ali v Sidney Mitchell & Co [1978] 3 WLR 849 ***(cit)***
Tan Kheng Ann & Ors v The Public Prosecutor [1965] 2 MLJ 108 ***(refd)***

Legislation referred to:
Criminal Procedure Code (FMS Cap. 6), ss 163, 164(i), 165(i), 166, 170
Dangerous Drugs Act 1952 (Act 234), ss 39B(1)(a), (1)(c), (3), 41A(1)
Courts of Judicature Act 1964 (Act 91), s 20
Penal Code, s 34

Other sources referred to:
Sohoni, 13th Edn, p 563

For the prosecution - Teo Say Eng; DPP
For the second and third respondents - Mary Jesmal Pereira; M/s Teh Poh Teik & Co
For the first respondent - R.A. Kumar; M/s Nijar Kumar Netto & Partners

JUDGMENT

Abdul Malik Ishak J:

This was an application by the prosecution for joinder of offenders under s 170 of the Criminal Procedure Code (FMS Cap. 6) ("CPC") and for these offenders to be jointly tried before me. The facts leading to the application may be stated as follows.

Both the second and third respondents were produced before the Johor Bahru Sessions Court *vide* arrest case no: 62-99-94 on the following charge:

> Bahawa kamu bersama-sama pada 18.9.94 lebih kurang jam 2.40 petang, di Stesyen Minyak Shell, Batu 6, Pandan, Jalan Kota Tinggi - Johor Bahru, dalam daerah Johor Bahru, dalam Negeri Johor, bagi pihak diri kamu sendiri atau bagi pihak sesiapa telah didapati mengedar dadah berbahaya ganja, sejumlah berat kasar 9637 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

In due course the prosecution tendered the consent from the Public Prosecutor under s 39B(3) of the Dangerous Drugs Act 1952 (Act 234) ("Act") and the requisition of the Public Prosecutor under s 41A(1) of the Act to the Johor Bahru Sessions Court who then transmitted the case to my Court (Johor Bahru High Court no: 2) ("Court 2") *vide* case no: 45-5-1996.

At the same time, the Johor Bahru Sessions Court *vide* arrest case no: 62-102-94 involving the first respondent was transmitted to the Johor Bahru High Court no: 3 ("Court 3") *vide* case no: 45-3-96 after having complied with the

provisions of the Act particularly s 39B(3) and 41A(1) thereof. The charge on which the first respondent had to answer was as follows:

> Bahawa kamu pada 18.9.94 lebih kurang jam 2.40 petang, di Stesyen Minyak Shell, Batu 6, Pandan, Jalan Kota Tinggi - Johor Bahru, dalam daerah Johor Bahru, dalam Negeri Johor, telah melakukan atau menawar untuk melakukan sesuatu perbuatan sebagai persediaan untuk atau bagi maksud pengedaran dadah berbahaya ganja seberat kasar 9637 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(c) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

I have, in so far as Court 2 is concerned, fixed the second and third respondents' case before me for hearing for six (6) days at a stretch beginning from 17 June 1996 to 22 June 1996. This must have been a cause of anxiety to the prosecution because they quickly filed an application to join the first respondent whose case was slotted before Court 3 with that of the second and third respondents whose case was slotted before Court 2. From the Bar, I was informed that Court 3 has yet to fix the first respondent's case for hearing. It is a sin to procrastinate and procrastination has been described as a thief of time. No matter how one looks at it, the delay by Court 3 in fixing the first respondent's case for hearing is of no concern to me but the application, by necessary implication, to transfer Court 3's case involving the first respondent to me is of paramount importance as it runs counter to s 20 of the Courts of Judicature Act 1964 (Act 91) as exemplified in *Chong Siew Choong v Public Prosecutor* CLJ JT (14) 1996; [1996] 2 CLJ 823. Without the Chief Judge's direction, I am not in a position to simply wrest the case from Court 3 and treat it as my own.

Before Court 3, the first respondent was charged as reflected in the consent and requisition for doing an act preparatory to trafficking in a dangerous drug ("melakukan perbuatan persediaan untuk tujuan memperedarkan dadah berbahaya" - to borrow the exact words that appeared in the consent and requisition which certainly are not on all fours with the charge as reproduced in the early part of this judgment) whereas before me, the second and third respondents were charged, as reflected in the charge as reproduced somewhere in this judgment, for jointly trafficking in a dangerous drug as opposed to the consent and requisition which recited s 34 of the Penal Code to show common intention on the part of both the second and third respondents to traffick in a dangerous drug. The prosecution is blameless in so far as the differences between the charges that were filed in Johor Bahru Sessions Courts with the consents and requisitions that have since been tendered and exhibited as Exhibits "TSE3" and "TSE4" of encl 4. The prosecution is perfectly free to tender amended charges before my Court and that of Court 3 in order to blend with the consents and requisitions. I am sure the prosecution is aware of the observations of Norris R. in *Lim Beh v. Opium Farmer* [1842] 3 Ky 110, 112 to the effect that:

> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged and may be prepared to answer the charge in the best way.

Jackson J in *Mahomed Humayoon Shah v Regina* 21 WR Cr 72, 82 (quoted in *Sohoni*, 13th Edn at p 563) explained the object of a charge in this way:

> The charge I take to be first, a notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself; second, it is an information to the Court which is to try the accused, of the matters to which evidence is to be directed.

In my judgment, it is a wholesome rule that the prosecution should adhere to the language of the statute as far as practicable, when a charge is drawn up; nothing is gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge.

Now, reverting back to the issue at hand, a joint trial of trafficking in a dangerous drug and for an act preparatory to trafficking in a dangerous drug can be viewed at two angles. The first would be the stand that these two charges are totally different in scope and meaning in that to prove trafficking in a dangerous drug, one need not and there is no necessity to prove an act preparatory to trafficking in a dangerous drug. The other angle would be to adopt the test which has been laid down in *Amrita Lal Hazra v Emperor* 42 Cal 957, where at p 983 the following pertinent passage appears:

> It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design.

As regards time and place, the charges against the first respondent and that of the second and third respondents were alleged to have been committed at the same time and place. Even the weight of cannabis as listed in the consents and requisitions show similarity of 9471 grammes. As regards continuity of action, the offences were not the same though they were committed at the same time and place. One offence was under s 39B(1)(a) of the Act and the other under s 39B(1)(c) of the Act. As regards continuity of purpose or design, the charge against the first respondent by relying on the consent and the requisition do not allege common intention under s 34 of the Penal Code whereas the charge against the second and third respondents as reflected in the consent and requisition cited common intention under s 34 of the Penal Code. As I said earlier the prosecution would certainly blend the charges before Court 2 and that of Court 3 with the consents and requisitions. It must not be forgotten that the ingredients of the same transaction as expounded in

Amrita Lal Hazra v Emperor (supra) must be read and applied cumulatively and not exclusively *(Lim Yean Leong v Public Prosecutor* [1940] 9 MLJ (FMSR) 272 and *Babulal Choukhani v Emperor AIR* 1938 PC 130) and that being the case it is my judgment that there should not be a joinder of offenders under s 170 of the CPC. The application by the prosecution must therefore be refused.

Going back to basic principles, it is not out of place to refer to certain sections in the CPC that are germane to the occasion. Section 163 of the CPC enacts that every distinct offence shall be tried separately except in the cases mentioned in ss 164, 165, 166 and 170 of the CPC. Section 164(i) of the CPC enacts that when a person is accused of more offence than one of the same kind committed within the space of 12 months he may be charged with and tried at one trial for any number of them not exceeding three. Section 165(i) of the CPC enacts that if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence. It is interesting to note that under s 166 of the CPC it provides that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences; and any number of such charges may be tried at once, or he may be charged, in the alternative, with having committed some one of the said offences. Finally, s 170 of the CPC enacts that where several accused persons commit the same offence or several offences of the same kind or different offences in the same transaction, then all the accused persons may be charged and tried together or separately as the Court "thinks fit". From the tenor of these sections in the CPC, only s 170 of the CPC would be applicable to decide the fate of this criminal application. The prosecution conceded, and rightly so, that the power to order separate or joint trials is entirely exercisable and at the discretion of the Court (*Jayaraman & Ors v Public Prosecutor* [1979] 1 MLJ 88) and I may add that that discretion is very subjective and it is up to the Court to so decide on the facts and circumstances of each case as it "thinks fit". This phrase is no doubt hallowed by time and much judicial repetition by other Judges, but it is a phrase often widely misunderstood and, by necessity, often misused. It is a good proposition to say that this phrase gives a wide judicial discretion to the presiding Judge to decide as to whether several accused persons may be charged and tried together or separately as the presiding Judge 'thinks fit' by looking at the peculiarity of the charges, the consents and the requisitions. Ultimately it is for the presiding Judge, in the exercise of his pure discretion, to decide which course he prefers to adopt and he cannot be faulted nor censured for choosing one course rather than the other. After all "Judges are more than mere selectors between rival views - they are entitled to and do think for themselves" (per Lord Wilberforce in *Saif Ali v Sidney Mitchell & Co* [1978] 3 WLR 849 at p 854) and in so

thinking Judges are entitled to decide for themselves in the context of the facts and circumstances of the case that presented themselves to the Judges. I cannot help but observe that the prosecution was in the position to monitor the movements of these two cases from the time they were filed in the Johor Bahru Sessions Courts right up to the time that these two cases were transmitted to the Johor Bahru High Courts. The prosecution holds the trump card; they knew that they wanted these two cases to be heard jointly by a single Judge of the Johor Bahru High Court; they took the risk in not asking the Johor Bahru Sessions Courts for joinder of these two cases and had they done so, these two cases would finally be transmitted to Court 2 or Court 3, whichever is relevant. The prosecution is now in a dilemma. They want the case against the first respondent slotted before Court 3 to be transferred to my Court (Court 2) so that there would be joinder of offenders under s 170 of the CPC with the second and third respondents. The prosecution knew that there are three High Courts of Malaya in Johor Bahru manned by three resident High Court Judges with different styles, approaches and foresights. All the reported cases on joinder of offenders under s 170 of the CPC relate to those cases that were filed in one and the same Court but with different numbers allotted to them and, consequently, applications for joinder of offenders would readily be granted by that Court. For instance in *Tan Kheng Ann & Ors v The Public Prosecutor* [1965] 2 MLJ 108 FC, there were 64 accused persons charged with three offences of illegal assembly with intent to cause the death of three persons. A joint trial was held to be valid because the offences were held to be committed in the same transaction. Another interesting facet is this. In those reported cases, s 20 of the Courts of Judicature Act 1964 (Act 91) was not adverted to at all in the context of one Judge taking the case from another Judge without the direction of the Chief Judge. Here before me, the application is impeded by lack of direction of the Chief Judge for me to take the case from Court 3 and treat it as my own. Alternatively, these two cases can be tried separately notwithstanding the fact that the exhibits are the same. Once the trial before me in regard to the second and third respondents have been completed, the relevant Court officer in charge of the exhibits may be called during the trial of the first respondent in Court 3 in order to establish beyond reasonable doubt the identity of the exhibits - a process which would be tedious in the extreme for the prosecution but certainly achievable by pure and simple diligence. Be that as it may, Miss Mary Jesmal Pereira for the second and third respondents and Mr. R.A. Kumar for the first respondent had nothing to say and they left the matter entirely to me. For once these two learned Counsels were short of words for otherwise they would be very vocal - full of fighting spirit at the Bar. For the foregoing reasons, I refused to entertain the criminal application filed by the prosecution and on the date of the hearing on 17 June 1996, I granted an adjournment on the request by the prosecution as I was told that the prosecution had filed an appeal against my refusal for joinder of offenders under s 170 of the CPC.

Reported by Gan Peng Chiang

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